IN THE

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Fall Term, 2002

No. 02-00140

UNITED STATES OF AMERICA
Appellee

v.

JENNIFER HANSEL
Appellant

On appeal from
Memorandum Opinion and Order Denying Defendant's Motion to Suppress Evidence
from the
United States District Court, Southern District of Ohio

BRIEF FOR JENNIFER HANSEL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Supreme Court Cases

Circuit Court of Appeals Cases

District Court Cases

State Court Cases

Constitutional Provisions

Statutes

STATEMENT OF JURISDICTION AND STANDARD OF REVIEW

This case deals with an evidentiary issue under the Fourth Amendment where the underlying charge is a crime against the United States: possession with intent to distribute methamphetamines, pursuant to 21 U.S.C. § 841. Section 3231 of Title 18 of the United States Code grants the District Courts of the United States jurisdiction to hear matters concerning offenses against the laws of the United States. 18 U.S.C. § 3231 (2002). This case is properly before the Court because an appeal from a final order of a District Court denying a motion to suppress evidence falls under the jurisdiction of the United States Courts of Appeals. 28 U.S.C. § 1291 (2002). Further, this appeal is timely, inasmuch as the notice of appeal, filed on August 5, 2002, has been filed within the statutorily prescribed time limit of thirty days from the date of judgment, here, July 29, 2002.

In reviewing a District Court's order on a motion to suppress evidence, the Court of Appeals must consider all legal determination regarding reasonableness, probable cause and exigent circumstances, under the Fourth Amendment, de novo. *U.S. v. Lewis*, 231 F.3d 238, 241 (6th Cir. 2000). Although the Court of Appeals must give deference to the District Court's findings of fact, these finding may be set aside if the Court of Appeals holds them to be "clearly erroneous." *Id*.

STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Under the Fourth Amendment, does a public employee have a reasonable expectation of privacy in the filing cabinet located within her area of the office against an intrusive, warrantless search, via hidden video equipment, by the government?

2. Under the Fourth Amendment, does the government have probable cause to search a public employee's office via a hidden video camera, based on information regarding alleged drug distribution, as offered by a lay person's past brief interaction with the drug?

3. Under the Fourth Amendment, do exigent circumstances exist when there is neither imminent threat that the employee will destroy the evidence prior to the federal agent's arrival, nor imminent threat to public safety?

STATEMENT OF THE CASE

This is an appeal from a memorandum opinion and final order of the United States District Court, Southern District of Ohio, rendered July 15, 2002. The lower court refused to suppress evidence seized by a federal agent during a warrantless search of Ms. Jennifer Hansel's office. *U.S. v. Hansel*, Judgm. Case No. 02-00140 (July 29, 2002). Absent probable cause and exigent circumstances, federal agent Kenneth J. Kandaras ("Agent Kandaras") installed a hidden video surveillance camera behind the wall clock inside Ms. Hansel's office, so as to search Ms. Hansel's office for possible criminal activity. Rpt. Of Drug Enforcement Administration Agent Kenneth J. Kandaras (n.d.) ("Exhibit D"). Subsequent to the government's warrantless search, Agent Kandaras arrested Ms. Hansel and charged her with possession with intent to distribute methamphetamines, pursuant to 21 U.S.C. § 841. Ms. Hansel filed a motion to suppress the evidence Agent Kandaras seized via the hidden video camera. The lower court denied the motion and on July 29, 2002 Ms. Hansel entered a conditional plea of guilty reserving her right to appeal this decision. On August 5, 2002, Ms. Hansel filed this timely appeal.

STATEMENT OF THE FACTS

Ms. Hansel, a devoted public employee of the Ohio Southern University College of Law ("COL"), was striped of her Fourth Amendment protection against unreasonable searches by the government when a federal agent, absent probable cause and exigent circumstances, installed a hidden video camera inside Ms. Hansel's office.

Ms. Hansel is one of two administrative assistants for the COL, in Kettering, Ohio. The other secretary is Ms. Nancy Matlock. Each secretary is required to sign an

agreement prior to employment, which lists each of his or her duties. Ohio S.U. College of Law Admin. Asst. Duties and Resps., (Aug. 15, 2000) ("Exhibit A"). As such Ms. Hansel's duties include taking dictation from the professors, selling course supplements the first three days of each term, copying exam questions, distributing graded exams for students to review, and administering professor evaluations at the end of each term. (Exhibit A, p.1-2 ¶¶ 4-7, 11). Also pursuant to this signed agreement, is a list of rules each secretary must follow so as to provide the most efficient and effective service to the school, its faculty and students. As such, each secretary is authorized a one hour lunch break, which should be taken at a time other than when their colleague is on break, in order to maintain a staffed office at all times. (Exhibit A, p. 2 ¶ 8). Further, if there is such a time as both secretaries are out of the office, it has become procedure to leave a note on the door stating the time a staff member will return. *Hansel*, Judgm. Case No. 02-00140 at 2.

The office itself is located on the fourth floor of Wilbur Wright Hall. (Exhibit A, p. 1 ¶ 1). Once inside the office, there are two distinct areas at which each secretary works. The two workspaces are divided by a partition and overhead bins, which reach 65 inches in height. Diagram of Wilbur Wright Hall Room 425 (n.d.) ("Exhibit B"). Thus, neither the secretary nor her work area is visible to the other while sitting at his or her own work area. A wall clock is located to the left of the doorway and is 86 inches above the floor. (Exhibit B). The clock is visible to both secretaries while at the work area, but is located directly across from Ms. Hansel's workspace. (Exhibit B). Within each secretary's "office" is a desk and a file cabinet, on top of which sits a desktop printer. *Hansel*, Judgm. Case No. 02-00140 at 2. It is practice that if one secretary's printer is not

working, she may use the other secretary's printer. *Id.* Also, Ms. Hansel and Ms. Matlock each keep all of their office supplies in their personal file cabinets, so as to keep them out of sight from the faculty. Mot. To Suppress Hrg. Tr. p.2:1 (July 1, 2002) ("Exhibit C").

At approximately one o'clock in the afternoon, Ms. Matlock was typing a letter for a professor. Her printer was jammed and the common room printer had a long line of jobs in front of hers; therefore Ms. Matlock decided to use Ms. Hansel's printer, which is located on the opposite side of the partition. Because Ms. Hansel was still at lunch, Ms. Matlock knew her printer would be available. (Exhibit C, p.1:2). Once in front of the printer, Ms. Matlock noticed that the toner light was on, and she decided to refill the toner in Ms. Hansel's printer. As is customary for each secretary to keep their own office supplies inside of the file cabinet, Ms. Matlock opened the top drawer of the cabinet to look for toner. While searching Ms. Hansel's file cabinet drawer, Ms. Matlock found six plastic bags containing white pills lying on top of the toner cartridges. (Exhibit C, p.2:3). Ms. Matlock decided in the few seconds she saw the pills that they were methamphetamines, the same drugs her brother had taken over twenty years ago to combat Attention Deficit Disorder. (Exhibit C, p.2:4). Ms. Matlock also discovered a small yellow post it note stuck to the inside of the drawer, which had five, colon, zero, zero, then four, slash, three, zero written on it. (Exhibit C, p.2:6). Although the vague note was not affixed to the bags, Ms. Matlock determined the numbers to be the date and time of the pills distribution. (Exhibit C, p.2:6). Finally, Ms. Matlock retrieved the toner cartridges from beneath the plastic bags and replaced the toner in the printer.

At approximately four thirty in the afternoon, Ms. Matlock left for home, never mentioning the bags to Ms. Hansel, nor any of her supervisors. Finally, at one o'clock in the morning, nearly twelve hours after finding the bags, Ms. Matlock decided to contact the Dean and tell him of her suspicions. (Exhibit C, p.3:1). The Dean subsequently called the police and the Drug Enforcement Agency ("DEA") was alerted of the "situation."

Federal agent Kenneth J. Kandaras, an employee of the DEA, worked with a tech director of the COL to install a hidden video camera behind the wall clock in the secretaries' office, so as to record criminal activity. The camera that was installed records and transmits the picture for viewing, but does not transmit any sound. According to Agent Kandaras, they worked from two in the morning until installation was complete at approximately four thirty in the morning. (Exhibit D). Although Agent Kandaras purports that installation of a camera such as this one can take a full working day, he and the tech director completed installation in only two and one half hours. (Exhibit D). At no point did Agent Kandaras or any other government agent, attempt to obtain the requisite search warrant necessary prior to a search.

Subsequently, at approximately 5:01am, Ms. Hansel entered the office, wrote something on a post-it note, walked out of the camera's range and returned to her desk. (Exhibit D). At 5:11am, Ms. Hansel stood up, walked to the office door and returned with three individuals. Ms. Hansel then opened the file cabinet drawer and exchanged the bags for money. (Exhibit D). The three individuals left and five others came into the camera's sight. Agent Kandaras, after viewing the entire transaction, approached the

office door, which was closed and had a note affixed to it stating, "back soon." The door opened, Agent Kandaras entered the office and arrested Ms. Hansel. (Exhibit D).

Ms. Hansel is charged with possession with intent to distribute methamphetamines, pursuant to 21 U.S.C. § 841. *Hansel*, Judgm. Case No. 02-00140 at 3. Ms. Hansel moved to suppress the evidence seized by the government without a search warrant. Ms. Hansel asserts the evidence was obtained illegally because it was based on invasive videotaping of her workplace area absent probable cause and exigent circumstances. The trial court denied Ms. Hansel's motion, holding that although she maintained a subjective expectation of privacy, she did not establish the requisite objective expectation of privacy. *Id.* at 4. Further, the trial court held that probable cause did exist, and although the government failed to obtain a search warrant, they were excused by the existence of exigent circumstances, specifically the threat of evidence destruction and threat of public safety. *Id.* Ms. Hansel subsequently pleaded guilty and reserved her right to appeal the court's decision.

Consequently, Ms. Hansel appeals to this court and respectfully requests that the trial court's denial of her motion to suppress be reversed and granted.

SUMMARY OF THE ARGUMENT

Ms. Hansel's motion to suppress should be granted. Ms. Hansel, a public employee, has a reasonable expectation of privacy inside her office, from the government's intrusive technological search. Ms. Hansel possesses both the requisite subjective and objective expectations of privacy within her office area. Consequently, a search has been conducted and her Fourth Amendment protections triggered. Further, the government fails to establish the requisite probable cause to conduct their highly invasive

search of the office. Finally, in failing to obtain the necessary search warrant, the government fails to excuse such improper behavior in their lack of demonstrating exigent circumstances. Therefore, the government infringes upon Ms. Hansel's Fourth Amendment Constitutional protection from unreasonable searches and seizures. Accordingly, the District Court's holding should be reversed and the motion to suppress the illegally obtained evidence granted.

ARGUMENT

Ms. Hansel, a public employee, has a reasonable expectation of privacy in her office; therefore the government's installation of hidden video surveillance equipment constitutes an unreasonable search infringing upon Ms. Hansel's Fourth Amendment rights. In order for Ms. Hansel to prevail against the government's intrusion and to trigger the protections offered by the Fourth Amendment, she must first establish both a (1) subjective and (2) objective expectation of privacy in her workplace. *Katz v. U.S.*, 389 U.S. 347 (1967). Inasmuch, Ms. Hansel has conducted herself in a manner consistent with one who holds an expectation of privacy, as well as one which society is prepared to recognize as reasonable. Moreover, the government failed to obtain both the requisite probable cause and warrant prior to conducting their invasive technological search. The government is obligated to demonstrate probable cause and acquire a warrant prior to conducting any search for criminal activity. *Agnello v. U.S.*, 269 U.S. 20 (1925). Finally, the government failed to demonstrate any exigent circumstances, such as imminent destruction of evidence and/or threat to public safety, so as to excuse their lack of a warrant. *Carroll v. U.S.*, 267 U.S. 132, 158-59 (1925). Therefore, Ms. Hansel's

Fourth Amendment protection from unreasonable searches by the government has been violated by the warrantless installation of hidden video surveillance inside her workplace.

I. MS. HANSEL, A PUBLIC EMPLOYEE, IS ENTITLED TO FOURTH AMENDMENT PROTECTION AGAINST TECHNOLOGICAL SEARCHES BECAUSE SHE HOLDS A REASONABLE EXPECTATION OF PRIVACY IN HER WORKPLACE.

Ms. Hansel has both a subjective and objective expectation of privacy in her workplace, therefore Agent Kandaras' installation of a hidden video camera constitutes an unreasonable search. The Fourth Amendment guarantees people the right to "be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." *U.S. CONST. AMEND. IV*. The United States Constitution prohibits unreasonable physical searches, as well as technological searches. *Katz*, 389 U.S. at 347. In determining whether a search triggers the protection of the Fourth Amendment, the defendant must demonstrate both (1) a subjective and (2) an objective expectation of privacy. *Id.* at 361. Here, Ms. Hansel, a public employee, conducted herself in a manner consistent with a person who has a reasonable expectation of privacy. Furthermore, Ms. Hansel's expectation of privacy is one society recognizes as reasonable. Therefore, Ms. Hansel's expectation of privacy was violated when the government installed hidden video surveillance inside her office.

A. Ms. Hansel, a public employee, is entitled to Fourth Amendment protection against technological searches in her workplace, because she conducts herself in a manner consistent with one who holds a subjective expectation of privacy.

Ms. Hansel has a subjective expectation of privacy within her work area. Whether a subjective expectation of privacy exists is determinative upon the defendant's

actual conduct, and their state of mind. *Vega-Rodriguez v. Puerto Rico Telephone Co.*, 110 F.3d 174, 178 (First Cir. 1997) (holding that the defendants possess a subjective expectation of privacy while at work, giving deference to a straightforward inquiry into the defendants' state of mind). Further, "what a person knowingly exposes to the public is not subject to Fourth Amendment protection, but what a person seeks to preserve as private, even in an area accessible to the public, may be Constitutionally protected." *Katz*, 389 U.S. at 351 (holding that telephone calls made within a public phone booth are subject to Fourth Amendment protection and the defendant's simple acts of closing the door to the booth and paying the toll permitting him the use of the phone is sufficient to establish a subjective expectation of privacy). Finally, as held by the trial court, demonstrating that the defendant is unaware of the videotaping of their activities is sufficient to constitute a finding that the defendant maintains a subjective expectation of privacy. *U.S. v. Hansel*, No. 02-00140 (S.D. Ohio July 15, 2002).

Here, Ms. Hansel, a public employee at the Ohio Southern University College of Law ("COL"), has a subjective expectation of privacy within her workplace. As found by the trial court, Ms. Hansel did not know or believe her activities were being videotaped, and thus she held a subjective expectation of privacy.

Ms. Hansel conducted herself in such a manner as to demonstrate nothing less than an expectation of privacy within her area of the office, especially within her personal filing cabinet. First, Ms. Hansel arranged for the meeting to occur five o'clock in the morning. (Exhibit D). At this hour of the day, a very limited number of people have access to the building, let alone Ms. Hansel's office. Second, Ms. Hansel shut the door to her office, further exhibiting her expectation of privacy. (Exhibit D). Moreover, similar

to the defendant in *Katz*, Ms. Hansel made the affirmative acts of placing the bags inside the file cabinet and shutting the drawer. (Exhibit C, p.2:1). Therefore, Ms. Hansel, like the defendant in *Katz,* did not expose anything to the public.

Additional evidence of Ms. Hansel's state of mind, consistent with an expectation of privacy, includes the fact the plastic bags were stacked on top of the toner in the file cabinet drawer, not hidden within the file cabinet itself. (Exhibit C, p.2:3). Therefore, if she did not have any expectation of privacy within the file cabinet, she would have hidden the bags underneath the toner packages, or at the back of the drawer. Also, Ms. Hansel did not deem it necessary to lock the file cabinet drawer. (Exhibit C, p.2:3). This implies that she did not believe anyone would be invading her personal area within the office. Thus, Ms. Hansel has a subjective expectation of privacy within her workplace area.

B. Ms. Hansel's expectation of privacy is one society considers as reasonable, because the nature of the office and Ms. Hansel's job are such that the government overreached their authority in the installation of highly invasive video equipment.

Ms. Hansel's expectation of privacy is one which society is prepared to recognize as reasonable. In order for the Court to determine a search was conducted and thus Fourth Amendment protections triggered, both a subjective and an objective expectation of privacy must be established. *Katz*, 389 U.S. at 361. In the Court's consideration of whether an objective expectation of privacy is reasonable, the Court considers three factors, (1) the nature of the area, (2) the nature of the job, and (3) the character of the invasion employed. *O'Connor v. Ortega*, 480 U.S. 709, 717-719 (1987) (balancing the nature and quality of the intrusion on individuals' Fourth Amendment interests against the importance of government interests). Here, the access to Ms. Hansel's office is very

limited, her job is not one of high security, which would require the surveillance of her duties, and the invasion the utilized by the government is one of such a highly intrusive nature society recognizes an expectation of privacy from it.

1. The general public's right to access Ms. Hansel's office is highly limited; therefore society recognizes an expectation of privacy from an invasive technological search by the government.

It is reasonable for society to recognize an expectation of privacy inside Ms. Hansel's office due to the general public's limited right of access to the office. In determining the whether there is an expectation of privacy the Court first considers the nature of the area searched. *O'Connor*, 480 U.S. at 718 (holding that the defendant had a reasonable expectation of privacy in his desk and file cabinets after consideration of who had access to the defendant's office, and who also had access to or shared in the use of his desk or file cabinets). Further, courts have declined to hold an expectation of privacy is objectively reasonable when the area is considered to be "open all the time" and there is "unfettered access" to the area. *Brannen v. Kings Local School Dist. Bd. of Edn.*, 144 Ohio App. 3d 620, 630 (Ohio App. 12th Dist. 2001); *Thompson v. Johnson Cty. Community Coll.*, 930 F.Supp 501, 507 (10th Cir. 1997) (holding that the defendants did not have a reasonable expectation of privacy in their break room because of the employees' general access to the room and the nature of the room as an "all purpose utility room").

Finally, the Alaska Supreme Court found a reasonable expectation of privacy from hidden video surveillance did not exist when the defendant's office was widely open to the public. *Cowles v. State*, 23 P.3d 1168, 1171, 1175 (Alaska 2001)

(emphasizing the determinative factors to be the public nature of the defendant's office and the fact the defendant's desk was visible to members of the public).

Here, the operational realities of Ms. Hansel's workplace establish that the office is not public in nature. Although the office is not solely for Ms. Hansel's use, as the case in *O'Connor*, at minimum, Ms. Hansel can reasonably expect to have a privacy interest within her desk and file cabinets because those items are primarily for Ms. Hansel's sole use. Ms. Hansel was issued a personal key to the office and to her own file cabinet. (Exhibit A, p.1 ¶ 3). Further, it is office policy not to lend out any keys to the office, thus creating a very limited scope of access to the office. (Exhibit A, p.1 ¶ 3). Although the faculty and students have a limited right of access during office hours, they are never permitted access to the contents of the secretaries' desks and file cabinets.

Ms. Hansel's office, distinguishable from *Brannen*, is unlike the break room area, and cannot be equated with an all purpose utility room. Further, unlike the locker room in *Thompson*, there is not "unfettered access" to Ms. Hansel's office, especially to her desk and file cabinets. As evidenced through Ms. Matlock's testimony, the secretaries keep their office supplies inside the drawers of the file cabinet, out of sight, so the faculty will not help themselves. (Exhibit C, p.2:1). This implies, at minimum, that the secretaries maintain a certain amount of privacy inside their cabinets and desk drawers. Although, arguably dissimilar from Dr. Ortega's sole access to his desk and file cabinets, the secretaries themselves may be permitted access to the contents of the other secretary's desk or file cabinet. However, in no way can it be construed as unlimited access. As noted by Ms. Matlock, the realities of the secretaries' workplace allow them to utilize each other's printers, but she makes no reference as to how infrequently they enter the

other's file cabinet or desk. (Exhibit C). Inasmuch, the limited access to Ms. Hansel's office is sufficient to justify society's belief that it is reasonable to have an expectation of privacy from hidden video surveillance inside the office.

2. Ms. Hansel's job is administrative and requires very low security precautions; therefore society recognizes an expectation of privacy from an invasive technological search by the government.

Society is prepared to recognize Ms. Hansel's expectation of privacy as reasonable because she is permitted to keep personal effects in her office and she does not work in a high security capacity. In determining whether there is an expectation of privacy, the Court next considers the nature of the job. *O'Connor*, 480 U.S. at 718 (considering whether there were any policies or regulations discouraging employees from storing personal papers and effects in their desks or file cabinets). Without violating any regulations of the hospital, Dr. Ortega kept personal, as well as professional, materials in his office, including personal correspondence, personal financial records, teaching aids, notes, and personal gifts and mementos. *Id.* at 718.

Courts also take into account the job's security implications. In *Cowles*, the court looked to the capacity of a job in its handling of money. The court reasoned that a diminished expectation of privacy is to be held in a "high security job." *Id.* at 1173-74 (holding that the defendant worked in a fiduciary capacity in an office where members of the public frequently exchanged money for tickets).

Here, the nature of Ms. Hansel's job is not one of "high security" and she is permitted to store personal effects within her office space. Similar to *O'Connor*, the "Administrative Assistant Duties and Responsibilities" agreement Ms. Hansel was required to sign fails to acknowledge any office regulation or policy that would

discourage Ms. Hansel from storing personal effects in her desk or file cabinets. (Exhibit A). Consequently, comparable to Dr. Ortega, Ms. Hansel did not violate any office regulation or policy and her expectation of privacy is thus further substantiated.

Finally, as distinguishable from the defendant in *Cowles*, Ms. Hansel's duties as an administrative assistant can in no way be construed as a "high security job." Ms. Hansel, unlike the defendant in *Cowles*, does not work in a fiduciary capacity where members of the public exchange money for items on a regular basis. Although, Ms. Hansel does handle the sale and distribution of course supplements as well as exam questions, which may be construed as "confidential documents," these duties are very limited in nature. During the course of an entire school year, Ms. Hansel acts in this capacity for only the first three days of each term, and no more than two weeks prior to examination time. (Exhibit A, p. 1-2, ¶¶ 5-7). As a result, in no way is Ms. Hansel's expectation of privacy diminished by her requirement to complete these duties. Accordingly, Ms. Hansel's expectation of privacy is reasonable and one which society recognizes as such.

3. <u>The highly invasive nature of hidden video surveillance is such that society reasonably recognizes an expectation of privacy from it.</u>

It is reasonable for society to recognize an expectation of privacy from highly intrusive surveillance by hidden video equipment. In the Court's determination of whether the defendant has an objective expectation of privacy, the final factor considered is the invasive character of the invasion employed. *O'Connor*, 480 U.S. 709 at 719. Video surveillance has been recognized to be one of the most intrusive forms of searches performed by the government. *U.S. v. Cuevas-Sanchez*, 821 F.2d 248, 250-51 (5th Cir. 1987). The court in *Thomas*, citing to *Cuevas-Sanchez*, held that the defendant had an

objective expectation of privacy. *State v. Thomas*, 642 N.E.2d 240 (Ind. App. 1st Dist. 1994) (holding that while one's expectations of privacy generally do not extend to incidental or occasional looks by members of the public, they do extend to prolonged observation by the government from a non-public vantage point). The surveillance in *Thomas* occurred from a "grossly intrusive vantage point." *Id.* at 245. The camera was located in the camp store's attic and ceiling, which was an area inaccessible to the public in open view.

Here, the inherent invasive nature of the video surveillance is such that, society reasonably expects there to be an expectation of privacy against it. Similar to the invasive vantage point of the camera in *Thomas*, the camera installed here recorded events that were unable to be viewed from a public vantage point. (Exhibit D; Exhibit B). The camera installed here is located inside the office, behind a wall clock, eighty inches above the floor and facing Ms. Hansel's personal workspace. (Exhibit B). From this point, one would have to be inside the office in order to view what the camera is capable is viewing. Because Ms. Hansel entered the office during non-business hours and shut the door to her office, it would be impossible for a person to have seen what the video captured. Therefore, the nature of the search is so intrusive, it is reasonable for society to expect protection from it.

II. THE GOVERNEMNT FAILS TO DEMONSTRATE THE REQUISITE PROBABLE CAUSE AND OBTAIN THE NECESSARY WARRANT PRIOR TO CONDUCTING THEIR INVASIVE TECHNOLOGICAL SEARCH OF MS. HANSEL'S OFFICE.

The government lacked the requisite probable cause to obtain a warrant and subsequently search Ms. Hansel's work area. The Fourth Amendment requires the government to obtain both (1) probable cause, and (2) a warrant, prior to conducting a

search. *Agnello v. U.S.*, 269 U.S. 20 (1925). Because the investigation of Ms. Hansel was pursuant to an alleged criminal activity and not for a work related purpose, the government must satisfy the probable cause and warrant requirements. *O'Connor*, 480 U.S. at 725-26 (holding a mere reasonableness standard is acceptable if a search is by employer for work related purpose).

Probable cause exists when there is reasonable cause to believe that the specific things, i.e. evidence of a crime, to be searched for and seized are located on the property to which entry is sought. *Carroll v. U.S.*, 267 U.S. 132, 158-59 (1925) (holding that the police officer's past knowledge of the defendants and their activities as bootleggers, warranted their heightened suspicion of the defendants and gave them the necessary probable cause to search their car). The principle components of a determination of probable cause are the events which occurred leading up to the search and whether, viewed from the standpoint of the reasonably objective law enforcement officer, the events amount to reasonable suspicion. *Ornelas v. U.S.*, 517 U.S. 690, 696 (1996).

Courts consider two factors in their determination of probable cause, (1) the training and/or experience of the informant, and (2) the reliability of the information on which the probable cause is based. *Id.* at 696. Here, the government fails to satisfy their burden of producing reliable information from a properly trained informant, thereby infringing upon Ms. Hansel's Fourth Amendment protections.

A. <u>The informant relied upon by the government is an inexperienced and untrained layperson who lacks the requisite knowledge sufficient to justify a finding of probable cause.</u>

The government fails to produce sufficient information that would cause a person of reasonable prudence to believe that methamphetamines are located inside Ms. Hansel's

office. In drug investigations, the court may consider the experience and expertise of the officers involved. *U.S. v. Buckner*, 179 F.3d 834, 837 (9th Cir. 1999). This experience and expertise may lead a trained narcotics officer to perceive meaning from conduct, which would otherwise seem innocent to the untrained observer. *Id.*

An informant's specialized knowledge and training is fundamental to a sufficient demonstration of probable cause. *Ornelas*, 517 U.S. at 700. The Court in *Ornelas* found that a police officer had probable cause to search the defendants' car based, in part, on the officer's specialized knowledge and training. *Id.*

Courts rely on the fact that a police officer may draw inferences based on his own experience in deciding whether probable cause exists. *Id* (noting that, to a layman, the loose panel below the backseat armrest in an automobile may only suggest wear and tear, but to an officer trained in narcotics arrests, the loose panel is sufficient to warrant suspicion that drugs may be located behind the panel). Additionally, the Court in *Worley*, relied on the experience of a plain clothes police officer in his belief the defendant possessed and had the intent to distribute narcotics. *U.S. v. Worley*, 193 F.3d 380, 383 (6th Cir. 1999) (affirming the district court's grant of defendant's motion to suppress).

Here, the government fails to establish probable cause that a criminal activity was taking place, since they relied upon information provided by an untrained layperson. Unlike the experienced police officer in *Ornelas*, Ms. Matlock, the sole person to view the bags in question, is not trained in the identification of narcotics. Ms. Matlock is a layperson, who holds an associate's degree in office management. (Exhibit C., p.3:5). Her only interaction with methamphetamines was over twenty years ago, when she was merely a teenager and her brother used the drugs to combat Attention Deficit Disorder.

(Exhibit C, p.2:4). Albeit Ms. Matlock may have seen and possibly handled the drugs at one point in her life several years ago, distinguishable from the police officer in *Carroll* and the DEA agent in *Worley*, she is in no way an expert. As noted in *Worley*, the life experience of the informant is important. The agent in *Worley* possesses life experience in narcotic identification that far surpasses that of Ms. Matlock. Thus, it is unreasonable to suggest that the two defendants' experiences are comparable, to justify a finding of probable cause.

Ms. Matlock cannot be considered educated enough on the subject of narcotic recognition to be relied on by the police as a competent witness, let alone the be sole foundation of the government's finding of probable cause. Therefore, the government's reliance on information provided by a layperson, inexperienced and untrained in narcotic identification, is insufficient to justify a finding of probable cause.

B. The government fails to establish a reasonable finding of probable cause because the information they relied upon is vague and unreliable.

The government's dependence on unreliable information prohibits them from asserting a reasonable finding of probable cause. "The core question in assessing probable cause based upon information supplied by an informant is whether the information is reliable." *United States v. Williams,* 10 F.3d 590, 593 (8th Cir.1993); see *U.S. v. Morales,* 238 F.3d 952 (8th Cir. 2001). In an assessment of the information's reliability, Courts look to whether the information is sufficiently corroborated. *Williams*, 10 F.3d at 593. Information may be sufficiently reliable to support a probable cause finding if the person providing the information has a track record of supplying reliable information, or if it is corroborated by independent evidence. *Id*. The requirement of

corroboration is directed at cases involving "second hand information," because the informant's credibility is especially at stake. *U.S. v. Pear*, WL 22796, 1 (6th Cir. 1991) (denying defendant's motion to suppress, based on information provided by a confidential informant's testimony under oath). In evaluating the reliability of an informant's information, the Court in *Morales* held that the first-time informant's information was sufficiently corroborated to provide probable cause to support a search of the defendant's vehicle. *Morales*, 238 F.3d at 952 (affirming the denial of defendant's motion to suppress evidence). The informant in this case had no record of cooperation with law enforcement, but the court determined, however, that the informant's story was sufficiently corroborated by independent evidence and was therefore reliable. *Id.*

Here, the Government's sole basis for their search rests on vague and unreliable second hand information. The government received a phone call from the Dean of the law school, who heard from Ms. Hansel's colleague, Ms. Matlock, that she saw several bags of white pills inside Ms. Hansel's file cabinet drawer and a vague post-it note stuck to the drawer. (Exhibit C, p2:3, 6). Although unattached to the plastic bags, Ms. Matlock presumed the post it note found stuck to the inside of the drawer to be the alleged time and date of distribution. The note was so vague, however, it is unreasonable to believe it would raise reasonable suspicion of an objective law enforcement officer. The note had five, colon, zero, zero, then four, slash, three, zero written on it in pencil. (Exhibit C, p.2:6). From this, Ms. Matlock surmised that the bags and their contents would be leaving the office the next morning at five o'clock. However, Ms. Matlock, claiming to be concerned for the students' well being, waited nearly eight and one half hours before deciding to contact the Dean. At this point it was one o'clock in the morning when the

Dean was aware of the situation and called the police. (Exhibit C, p.3:1). Thus, unlike the informant in *Morales,* Ms. Matlock's assessment of the situation is uncorroborated. There is no evidence suggesting anyone else observed the contents of the file cabinet. (Exhibit C). Further, there is no evidence suggesting that the Dean of the school entered the office after his telephone conversation with Ms. Matlock to confirm her suspicions. (Exhibit C). Finally, distinguishable from the informant in *Pear,* Ms. Matlock did not offer her testimony under oath until the Motion to Suppress Hearing. (Exhibit C). This supports the fact that the government failed to establish the credibility of the sole informant on whom they were relying. Thus, the police, relying exclusively upon second hand information, decided to forgo their Constitutional responsibility to obtain a search warrant and install hidden video equipment. Based on the insufficient and uncorroborated second hand information, the government fails in its burden of establishing probable cause.

III. THE GOVERNEMNT FAILS TO BOTH OBTAIN THE REQUISITE WARRANT AND FURTHER JUSTIFY SUCH INAPPROPRIATE CONDUCT BY ESTABLISHING EXIGENT CIRCUMSTANCES.

In failing to obtain a warrant prior to their invasive search of Ms. Hansel's office, the government further fails in sufficiently establishing exigent circumstances to excuse their inappropriate conduct. Warrantless searches are presumptively unreasonable under the Fourth Amendment. *Katz,* 389 U.S. at 357 n.18. The only way to refute this presumption is to establish the existence of exigent circumstances. *U.S. v. Morgan*, 743 F.2d 1158, 1162-63 (6th Cir. 1984); *U.S. v. Ukomadu,* 236 F.3d 333, 337 (6th Cir. 2001). Moreover, the burden of proof rests on the government to show exigent circumstances. *U.S. v. Ogbuh*, 982 F.2d 1000, 1003 (6th Cir. 1993). The government failed both in

obtaining a warrant and in proving that there was any imminent threat of destruction of evidence or to the public's safety. Therefore, the government's search of Ms. Hansel's office is unreasonable and infringes upon her Fourth Amendment rights.

A. The presumption that a warrantless search is unreasonable implies the gravity of the warrant requirement; therefore attempting to obtain a late night warrant is a reasonable option the government fails to fulfill.

Despite the numerous ways to obtain a warrant, the government fails to justify their failure in even attempting to obtain the requisite warrant prior to their highly invasive search of Ms. Hansel's office. Federal Rule of Criminal Procedure 41 states the requirements and procedures necessary to obtain a warrant. Fed. R. Crim. P. 41 (2002). Implicit in the Rule is that there are a variety of options available to government agents regarding a means to obtain a warrant. *Id.* at 41(c)(2)(A-D). Moreover, emergency search warrants have become common procedure. *U.S. v. Halliman*, 923 F.2d 873, 879 (D.C. Cir. 1991) (noting that although exigent circumstances did exist, there are options available to police officers seeking a warrant late at night). Also, Courts have commended police officers for utilizing a procedure for obtaining a warrant on an expedited basis. *U.S. v. Howard*, 984 F.Supp. 31, 34 (D.C. Cir. 1997) (commenting further that the Court could not understand why the police fail to utilize the recognized process of contacting an emergency duty Assistant U.S. Attorney for obtaining a warrant).

Here, the government failed to utilize any of the various options available to them in obtaining a warrant. As stated in Federal Rule of Criminal Procedure 41(2)(A), a warrant may be issued via telephone. However, the government, despite the fact Agent Kandaras knew it could take several hours to install the camera, failed to even attempt to

obtain a warrant. Further, several hours elapsed between the time the police were informed and the actual time of delivery to the students. (Exhibit C, p.3:1; Exhibit D). Thus, the police failed to obtain a warrant despite the fact they had a realistic opportunity to do so, and subsequently violate Ms. Hansel's Fourth Amendment protections from such conduct.

B. The government fails to establish the presence of exigent circumstances so as to excuse their lack of obtaining a search warrant in the reasonable amount of time with which they had to do so.

There was neither the imminent threat Ms. Hansel would destroy the evidence, nor an imminent threat to public safety resulting from Ms. Hansel's actions. "Searches without a warrant are presumptively unreasonable under the Fourth Amendment." *Katz,* 389 U.S. at 357 n.18. Further, those suspected of drug offenses are no less entitled to Fourth Amendment protection than those suspected of nondrug offenses." *United States v. Karo*, 468 U.S. 705, 717 (1984). This presumption is rebuttable only by demonstrating probable cause and exigent circumstances. *Ukomadu*, 263 F.3d at 337. Under the highly limited nature of this exception, very few circumstances constitute "exigent." The circumstances include, a situation that represented an immediate threat to the arresting officer or the public, the prevention of imminent evidence destruction, or to thwart the escape of known criminals. *Morgan*, 743 F.2d at 1162-63 (finding no exigent circumstances to justify the warrantless intrusion by the police onto the defendant's property). Thus, in the instant case, there remain two possible exemptions that the government may attempt to argue, the threat of evidence destruction and a threat to public safety. However, Ms. Hansel's conduct reveals that she did not attempt to destroy the evidence nor was there any imminent threat to the public's safety.

1. The government fails to establish sufficient evidence suggesting Ms. Hansel would have destroyed the contents of the file cabinet before the government had time to obtain a warrant.

Ms. Hansel's actions reveal no thoughts of or attempt to destroy the evidence contained inside her filing cabinet. The exigent circumstances exemptions are limited. Under the threat of evidence destruction, the circumstances must be such as to lead a person of reasonable caution to conclude the evidence would probably be destroyed within the time necessary to obtain a search warrant. *U.S. v. Campbell*, 261 F.3d 628, 632 (6th Cir. 2001). However, the mere possibility of the destruction of evidence is insufficient to warrant an objectively reasonable basis for belief of evidence destruction. *Ukomadu*, 236 F.3d at 337 (holding that the threat of the defendant destroying the evidence was imminent because once the package was open, the police tampering would be evident and the defendant would know the police were on to him). "Where there are exigent circumstances in which police action must literally be "now or never" to preserve the evidence of a crime, it is reasonable to permit action without prior judicial evaluation. *Roaden v. Kentucky*, 413 U.S. 496, 505 (1973) (holding that where a film was being shown to the public on a regular basis, there were no exigent circumstances requiring police to act "now or never" to preserve evidence). Further, in *Campbell*, the Court noted that it was reasonable to believe the defendant, whose suspicions were already raised due to the presence of a marked police car in front of his house, would immediately examine the contents of his package, notice that the contents were tampered with by the police and destroy the evidence. *Campbell*, 261 F.3d at 632. Thus the Court held exigent circumstances did exist and a warrantless search was permissible. *Id.*

Here, there is no threat, imminent or otherwise, to suggest Ms. Hansel was going to destroy the evidence. Distinguishable from the defendant in *Campbell,* Ms. Hansel would not have discovered the video camera behind the wall clock, her suspicions were not raised and it was therefore not objectively reasonable for the police to believe Ms. Hansel would have destroyed the evidence. Furthermore, as was sufficient in *Morgan* to establish a lack of exigent circumstances, there is no evidence in the record to even suggest Ms. Hansel was engaged in the destruction of evidence or had plans of such an act.

Moreover, similar to the finding in *Roaden,* the circumstances here are not such to require police action to be "now or never." There was a sufficient amount of time that elapsed between the time the government received the informant's tip and the actual time of alleged distribution. (Exhibit D). Therefore, as noted above, sufficient time remained to obtain a warrant and police action was not immediately necessary. Therefore, the government fails to prove the imminent threat of evidence destruction and the Constitutional duty to obtain a search warrant remains.

2. <u>The government fails to establish sufficient evidence of any threat to the public's safety as a result of Ms. Hansel's actions.</u>

The government fails to establish adequate evidence to sustain a reasonable belief there was a threat to public safety. In determining the existence of exigent circumstances the court may also consider whether there is a threat to public safety. *Welsh v. Wisconsin,* 466 U.S. 740, 748-52 (1984) (holding that the seriousness of the offense may qualify as a "threat to public safety," but declining to hold driving while intoxicated as such an offense). Courts consider the conditions surrounding the alleged crime as well as the actual offense supposedly being committed. *U.S. v. Johnson,* 9 F.3d 506, 510-511

(6th Cir. 1993) (holding the real threat to public safety was presented by the potential presence of explosive devises on the premises and not simply the suspected burglary offense being committed).

In consideration of whether there is a threat to public safety, Courts have been very cautious to narrowly tailor the exception. *U.S. v. Walsh*, 299 F.3d 729, 734 (8th Cir. 2002). In *Walsh*, the Court upheld a finding of exigent circumstances, not because of the possible distribution of methamphetamines, but because of the potential hazards of the manufacturing of such drugs. *Id* (holding that strong smells of ether, the equipment and residue found in a shed suggested the ongoing manufacturing of methamphetamines). Further, in *Ball*, the Court found it reasonable for an officer to believe the presence of an armed suspect, and not the alleged offense of narcotic distribution, to justify a finding of exigent circumstances. *U.S. v. Ball*, 90 F.3d 260, 263 (8th Cir. 1996).

Here, there is no threat to public safety as a consequence of Ms. Hansel's actions. Similar to the crime committed by the defendant in *Welsh*, Ms. Hansel's offense cannot be such an offence to be deemed so grave. The nonviolent offence, in comparison to the extremely invasive measures taken by the government, fails to reach the heightened gravity *Welsh* argues to be necessary. In *Welsh* the offense consisted of driving while intoxicated, which arguably offers more of a threat to public safety than a mere possibility of narcotic distribution to a limited handful of adults.

Furthermore, Ms. Hansel's case is distinguishable from *Walsh* and *Ball*, where alleged narcotic distribution was also at issue. Unlike the presence of an armed suspect in *Ball*, there is no evidence to suggest Ms. Hansel was armed nor was there the presence of any other person who may cause a similar threat to the public's safety. (Exhibits A, C,

D). Additionally, unlike the defendant in *Walsh*, there is no concern as to whether Ms. Hansel was manufacturing the alleged drugs at issue. The alleged mere distribution of narcotics is insufficient to qualify as an imminent threat to the public's safety. An alternate finding would only prove to expand the limit of the exception beyond its original purpose and infringe upon the Constitution's protection of a person's right to be free from unreasonable searches. Therefore, there is no imminent threat to public safety.

Accordingly, no exigent circumstances exist so as to excuse the government from the Constitutional duty of obtaining a warrant. Therefore the District Court's decision should be reversed and Ms. Hansel's motion to suppress should be granted.

CONCLUSION

For the foregoing reasons, this Court should overrule the District Court's order denying Ms. Jennifer Hansel's Motion to Suppress.

Respectfully Submitted,

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APPENDIX: RELEVANT STATUTES

The Fourth Amendment to the United States Constitution

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Code, Title 21, Chapter 13, § 841

(a) Unlawful acts. Except as authorized by this subchapter, it shall be unlawful for any person, knowingly or intentionally, (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

United States Code, Title 28, Section 1291

The Courts of Appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States.

United States Code, Title 18, Section 3231

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

United States Code, Federal Rules of Criminal Procedure, Rule 41 (2A), (2D)

(2A) General Rule. A Federal magistrate judge may issue a warrant based upon sworn testimony communicated by telephone or other appropriate means, including facsimile transmission.

(2D) Recording and Certification of Testimony. When a caller informs the Federal magistrate judge that the purpose of the call is to request a warrant, the Federal magistrate judge shall immediately place under oath each person whose testimony forms a basis of the application and each person applying for that warrant.